In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 2

NEW WORLD LIFE INSURANCE COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION OF THE UNITED STATES TO DISMISS WRIT OF CERTIORARI

The Solicitor General, pursuant to Rule 7, paragraph 3 of the Rules of the Supreme Court, moves that the writ of certiorari herein be dismissed on the ground that this case is now moot, since the judgment of the court below would remain unchanged regardless of how this Court might decide the issue raised by petitioner which is now before the Court.

Petitioner instituted this suit in the Court of Claims to recover income taxes paid by it for the four-year period 1929–32. In order to simplify the discussion herein we will undertake to show first that the issue is moot as to the years 1929 and

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1930. Although the result is the same for the years 1931 and 1932, the issue is presented in somewhat different form, and we will, therefore, consider those years separately.

1. *The years 1929 and 1930.*—Petitioner's sole ground for recovery in the Court of Claims was that it had been erroneously denied, under Section 203 (a) (5) of the Revenue Act of 1928, a full deduction for that portion of its officers' salaries which it allocated to "investment expenses", and that it had therefore overpaid its taxes in that respect. That was the *sole* issue presented in its claim for refund for the years 1929 and 1930 (R. 30–31, par. 26), and that was the *sole* item of refund for those years which it sought in its bill of complaint. See Count I, par. (7) with respect to the year 1929 (R. 3),[1] and Count II, par. (7) with respect to the year 1930 (R. 6).[2]

In the Court of Claims, the Government defended on two grounds. *First,* it undertook to

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[1] Thus it appears that petitioner's tax for the year 1929 was computed on the basis of a net income of $63,430.42, whereas petitioner contended in its pleadings before the Court of Claims that that net income should have been reduced by $17,149.92, representing investment expenses which the Commissioner had disallowed under Section 203 (a) (5) of the 1928 Act (R. 3).

[2] Similarly, for the year 1930, petitioner's tax was computed on the basis of a net income of $85,805.70, and petitioner's sole attack in its pleadings against that computation was that its net income should have been reduced by $21,492.21, representing investment expenses which the Commissioner had likewise disallowed (R. 6).

support the Commissioner's interpretation of Section 203 (a) (5), and contended that the Commissioner correctly disallowed the disputed investment expenses. *Second,* as an affirmative defense, it argued alternatively that even if those investment expenses should have been deducted, the taxpayer had nevertheless *underpaid* its taxes with respect to a wholly different item by taking deductions on account of its reserve funds for health and accident insurance. It was too late for the Government to attempt to assess any deficiency with respect to that second item, for the statute of limitations had already run. But it was still open to the Government to show, defensively, that the taxpayer had in fact underpaid its taxes with respect to that item, in order to offset any possible overpayment by the taxpayer on the investment expense item. *Lewis* v. *Reynolds,* 284 U. S. 281.

The Court of Claims ruled against the taxpayer on the investment expense issue, holding that the Commissioner correctly disallowed the disputed deduction. In so holding the Court of Claims completely disposed of the only item with respect to which the taxpayer was seeking any refund for the years 1929 and 1930. It was thus wholly unnecessary for the court below to proceed to consider whether, had it ruled the other way on the investment expense issue, any resulting refund to the taxpayer would be offset by its underpayment of taxes on account of its health and accident reserve deductions. Nevertheless, the Court of

Claims did go on to consider the Government's alternative defense, and decided that issue in the Government's favor. However, it is plain that it was immaterial whether that second issue was decided for or against the Government. The court had ruled against the taxpayer on the investment expense issue, thus making it impossible for the taxpayer to obtain any refund for the years 1929 and 1930, regardless of the soundness of the Government's alternative affirmative defense.

The taxpayer's petition for certiorari presented both the investment expense and the reserve questions, without disclosing that the second question was simply a defensive issue that would become moot once the first question were decided against it. The Government's brief in opposition simply pointed out that both issues were correctly decided, that there were no conflicts and that the petition should therefore be denied. This Court denied certiorari, 308 U. S. 612. Thereafter, the taxpayer called the Court's attention to a subsequent decision of the Circuit Court of Appeals for the Fifth Circuit which ruled contrary to the Court of Claims on the reserve issue, in a case where that issue was squarely presented (*Commissioner* v. *Pan-American Life Ins. Co.*, 111 F. (2d) 366). This Court thereupon vacated its order denying certiorari, and granted certiorari "limited to the second question presented" (R. 70), *i. e.*, the reserve issue. There was still no conflict as to the wholly separate investment expense issue, and

there was therefore still no occasion to review the action of the Court of Claims thereon.

Thus, this case is now in this posture: the only ground upon which petitioner could be entitled to a refund below (the investment expense issue) was decided against it by the Court of Claims, and this Court has denied further review. But the Court has granted certiorari on the second issue, the determination of which can in no way affect the judgment entered by the court below. Thus, the only question in this case before the Court is moot.[3]

2. *The years 1931 and 1932.*—Although several additional elements are present for the years 1931 and 1932, the ultimate situation is precisely the same as that presented for the two preceding years, namely, that the judgment entered by the Court of Claims can in no way be affected by the health and accident reserve issue and that the issue is therefore moot.

Petitioner's bill of complaint sought refund for the years 1931 and 1932 on account of alleged overpayment of taxes with respect to the deduction for investment expense as well as two other items.

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[3] The Government has petitioned for certiorari in the *Pan-American* case, No. 264, present Term, relying largely upon the conflict with the decision below in the instant case. At the time that petition was prepared, we had not realized that the issue in the instant case was moot. Although the issue in the *Pan-American* case is not moot, the Court will undoubtedly wish to consider whether there will remain any basis for certiorari in that case, if it grants our motion to dismiss in the instant case.

See Count III, par. (8) with respect to the year 1931 (R. 9–10),[4] and Count IV, par. (8) with respect to the year 1932 (R. 13–14).[5]

However, in his final determination for the years 1931 and 1932, the Commissioner conceded the correctness of the taxpayer's position as to the other two items.[6] But no refund was forthcoming to petitioner with respect to the two additional items for either of the years 1931 and 1932, because of certain uncontested offsets which completely absorbed those additional items.[7]

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[4] Petitioner sought refund with respect to three items for the year 1931: First, investment expense deduction of $24,124.61; second, depreciation on farm buildings in the amount of $3,675.26; and third, so-called nontaxable income in the amount of $2,000 (R. 9). As pointed out in the text, however, the Commissioner conceded the correctness of the taxpayer's position with respect to the second and third items (R. 21, Finding 9 (d)), thus leaving in controversy only the investment expense issue.

[5] Similarly, petitioner sought refund with respect to three items for the year 1932: First, investment expense deduction of $26,634.31; second, depreciation on farm buildings in the amount of $5,272.06; and third, interest in the amount of $1,638.30 (R. 13). And, as in the case of the year 1931, the Commissioner likewise conceded the correctness of the taxpayer's position with respect to the second and third items for the year 1932 (R. 23, Finding 12 (d)), thus leaving in controversy only the investment expense issue for the year 1932.

[6] See footnotes 4 and 5, *supra*.

[7] For the year 1931 the Commissioner disallowed certain deductions aggregating $12,582.62, of which petitioner contested only $4,937.58 (see Finding 9 (b), at R. 21), thus leaving an undisputed correction in favor of the Government in the amount of $7,645.04. But that amount exceeds

The situation with respect to the years 1931 and 1932 is, therefore, as follows: Petitioner sought refund with respect to its investment expenses and two other items. The other two items for each of the years have been eliminated from the case as a result of concessions by each side. There remains, therefore, simply a suit for refund with respect to the investment expense issue—a situation identical with that for the two earlier years, 1929 and 1930. And the reserve issue was likewise raised by the Government simply as an affirmative defense for the years 1931 and 1932 as it had been for the two earlier years.

Thus, the reserve deduction issue was in this case as to all four years solely as a defensive issue raised by the Government, and completely disappeared from the case once the investment expense

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the two items which the Commissioner conceded in favor of the taxpayer (see footnote 4, *supra*), with the consequence that no refund was due to petitioner as a result of the Commissioner's concession.

Similarly, for the year 1932 the Commissioner disallowed certain deductions aggregating $16,917.13, of which petitioner contested only $4,920.24 (see Finding 12 (b), at R. 22–23), thus leaving an undisputed correction in favor of the Government in the amount of $11,996.89. And, as in the case of the year 1931, that amount exceeds the two items which the Commissioner conceded in favor of the taxpayer (see footnote 5, *supra*), thus eliminating any possibility of a refund to petitioner as a result of the Commissioner's concession.

issue was decided in the Government's favor. The decision of the court below on the investment expense issue was plainly correct, there was no conflict on that question, and this Court properly refused to grant certiorari thereon. And since the reserve issue was simply attached to the investment expense issue as an additional defense in the event that the taxpayer should prevail on the investment expense issue, the elimination of the investment expense issue from this case automatically eliminated the reserve issue, thereby rendering it moot. We, therefore, respectfully submit that since the reserve issue is moot, the petition should be dismissed, since it has long been settled that the Court will not decide cases where it cannot grant any relief. See, *e. g., Tennessee* v. *Condon,* 189 U. S. 64; *American Book Co.* v. *Kansas,* 193 U. S. 49; *Furness, Withy & Co.* v. *Yang-Tsze Ins. Ass'n,* 242 U. S. 430.

FRANCIS BIDDLE,
Solicitor General.

SEPTEMBER 1940.

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